United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

74-2597

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

PAUL CAMPBELL,

Plaintiff-Appellee,

-against-

R. G. DICKINSON & CO., ROBERT GOODELL DICKINSON and MAURICE BURR CORNELISON,

Defendants,

R. G. DICKINSON & CO.,

Defendant-Appellant.

Appeal From the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANT-APPELLANT

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Docket No. 74-2597

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BRIEF OF DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from (1) the final judgment entered after trial before the Honorable Lloyd F. MacMahon and a jury, and from (2) the order of Judge MacMahon denying defendant-appellant's motion for judgment notwithstanding the verdict or for a new trial. (A93; A97)

ISSUES PRESENTED FOR REVIEW

1. Did the court below err in failing to direct a verdict, or to enter judgment notwithstanding the verdict, dismissing plaintiff's claim under his employment agreement on the ground that he had resigned?

2. Did the court below err in failing to direct a verdict, or to enter judgment notwithstanding the verdict, dismissing plaintiff's claim that the payment made to his employer as reimbursement for a loss was a loan?

3. Alternatively, did the court below abuse its discretion in failing to set aside the verdict and order a new trial?

NATURE OF THE CASE

Paul Campbell, the plaintiff-appellee, was employed for about six months by R. G. Dickinson & Co. ("RGD & Co."), the defendant-appellant (A50-51). RGD & Co. was a securities broker, with its main office in Des Moines, Iowa, and offices in other cities, including New York (A18). Campbell worked in the New York office with two fellow-employees: Brainard and McNell (A27-28).

Soon after Campbell was hired, he and his fellow employees became involved in a controversy with RGD & Co. concerning an order to buy stock sent in by the New York office. The customer in whose name the stock had been purchased denied any knowledge of the order and refused to pay (A19-20). RGD &

Co. advised Campbell, Brainard and McNell that it had had to sell the stock at a loss of $15,000 and demanded reimbursement (A32). Eventually, Campbell borrowed the $15,000 from a bank and paid it to RGD & Co. (A33, 59).

No writing passed between Campbell and his employer concerning the nature of this payment.

A few months later, Campbell was informed that RGD & Co. was closing the New York office (A51). He submitted a letter of resignation to the company and left its employ (A52). Following the resignation letter, he sent two additional letters to RGD & Co., demanding repayment of the $15,000 (A56-57).

These letters were the only writings that passed between Campbell and his employer in connection with the termination of his employment.

COURSE OF PROCEEDINGS

Campbell's complaint alleged two claims. The first claim was for $18,000 on the theory that he had been discharged in breach of a one-year oral employment agreement. The second claim was for an additional $15,000 on the theory that the payment to his employer represented a demand loan. Jurisdiction was alleged on both diversity and securities law grounds (A4-7).

In addition to RGD & Co., two of its officers (Dickinson and Cornelison) were named as defendants (A3). These two officers attended the trial in New York and testified (A8, 69). A third officer, Boesel, who had not been named as a defendant and did not attend the trial, was described by plaintiff's

witnesses as the chief spokesman for RGD & Co. in the discussions leading up to the alleged $15,000 loan (A32, 54).

DISPOSITION IN THE COURT BELOW

At the close of plaintiff's case, the court below dismissed as to the individual defendants and reserved decision on a motion for a directed verdict in favor of the corporate defendant (A65-68). RGD & Co. renewed its motion for a directed verdict at the close of all the evidence and decision was again reserved (A79). The court below submitted to the jury the following four special interrogatories and they were answered as indicated (A84):

1. Did the defendant R. G. Dickinson & Co. agree to employ plaintiff for one year at $2500 a month plus expenses?

   Answer: Yes

2. Was plaintiff discharged or did he resign after six months?

   Answer: Discharged

3. Was the $15,000 paid by plaintiff to R. G. Dickinson a loan by plaintiff to R. G. Dickinson?

   Answer: Yes

4. Did plaintiff convert the typewriter?

   Answer: No

Upon receipt of the above answers, RGD & Co. orally moved for judgment notwithstanding the verdict or for a new

trial (A86). This motion was immediately denied (A86-88). After entry of judgment for Campbell in the amount of $33,000, exclusive of interest, RGD & Co. filed a formal written motion for judgment n.o.v. or a new trial, contending that the jury's answers to the second and third interrogatories must be set aside as a matter of law (A94). The court below entered an order treating the formal motion as a motion for reargument and denying the substantive relief requested therein (A97).

FACTS RELEVANT TO CAMPBELL'S CLAIM UNDER HIS EMPLOYMENT AGREEMENT

Campbell testified at the trial that he had been orally promised a year's employment at $2500 per month (A50). This was in conflict with the testimony given for RGD & Co., which was that Campbell had been guaranteed only six months employment at $2000 per month (A12). There was no dispute that Campbell had been actually employed for only six months and had been paid the sum of $12,000 during that period (A17, 50-51).

The relevant evidence further showed that:

(a) Toward the end of the six-month period, RGD & Co. informed Campbell that the New York office would be closed and he took this to mean that he had been fired (A17, 29, 51-53);

(b) RGD & Co. had other opportunities available in its offices outside New York but did not offer any such opportunities to Campbell (A18, 29);

(c) Of his own volition, Campbell submitted a letter of resignation to RGD & Co., so as to facilitate his getting another job as a securities broker A18, 52);

(d) After his resignation letter, Campbell sent two other letters to RGD & Co., demanding payment of the $15,000 allegedly owed to him, but making no reference to his claim for $18,000 due under the employment agreement (see A91-92).

At the close of plaintiff's evidence, the court below characterized the case for discharge as having been "made out of whole cloth" (A65-66). No reference was made to the finding of discharge by the court below when it later gave its reasons for refusing to set aside the jury's verdict (see A86-88).

FACTS RELEVANT TO CAMPBELL'S CLAIM THAT THE $15,000 PAYMENT WAS A LOAN

There was no dispute at the trial that:

(a) The $15,000 payment made by Campbell was to reimburse his employer for a loss caused by the New York office (A29-33, 54);

(b) Campbell borrowed the money from a bank in order to make the payment (A33, 59);

(c) Campbell's fellow-employee, Brainard, gave Campbell a demand promissory note for half the $15,000 loss (A34-36, 89).

The testimony given for RGD & Co. was that the company held Brainard responsible for the $15,000 loss but accepted an arrangement whereby Campbell borrowed the money from a bank to make reimbursement because Brainard had no credit rating (A70-72, 76-77). Brainard testified that McNell was actually responsible for the trade that caused the loss but that the order had been sent to Des Moines assigned to Brainard's account, which was used by the New York office as a "house account" (A29-32, 38-39). Campbell was not licensed to solicit orders at the time these events occurred (A72).

At the trial, plaintiff's witnesses gave the following description of the circumstances of the $15,000 payment (A32-33, 37, 54-55, 63):

Brainard

> "I received a phone call from Mr. Boesel, which sticks out in my mind particularly, but, as were the habits, the phone call was generally a conference call, in that they have a conference microphone in Mr. Boesel's office. So I believe Mr. Cornelison was present as well. The gist of the conversation was that there was an error -- rather, there was a $15,000 loss, and that I was told that money was short and that they wanted the error covered. I discussed the matter with Mr. McNell, who declined any knowledge of the matter. I was then told to solicit basically anybody else in the office that wanted to come up to it, with the inference that if the money did not come up, the office would be closed. That was not stated, however, but that was my interpretation of the conversation.
>
> "I was assured that we would, if the money were produced, that we would remain in business, that I would receive my guarantee, which was $3000 a month, Mr. Campbell would retain his position; that we would have an opportunity to build this office as we had agreed previously.
>
> "I told them that we would get back to them.

And so Mr. Campbell and I discussed the situation, and inasmuch as Mr. Boesel and Mr. Cornelison, by inference, I think Mr. Dickinson, gave us their word of honor, that they were men of good faith, I encouraged Paul to go to the bank and get a loan, as I was sure that he would get it back. Such was not the case.

"Q Was there a specific promise of repayment, to your knowledge?

"A It was my understanding that there would be, yes, sir.

* * * *

"THE COURT: You say Mr. Boesel's word. Who is Mr. Boesel?

"THE WITNESS: He is the president of R. G. Dickenson & Company.

"THE COURT: What was his word? What did he say, this word you had so much faith in?

"THE WITNESS: He said on his honor.

"THE COURT: On his honor what?

"THE WITNESS: That we were doing the right thing by giving him the firm -- loaning the firm the money, and that we would have the opportunity, Paul would have the opportunity to be repaid the loan, that the office would stay open, and that our venture would continue with their support and backing and that there would not be any recriminations, if you will."

Campbell

"Q What were the circumstances of your recollection of the giving of the $15,000 by you if you can tell us?

"A Well, that in effect the company, the firm, was looking to the New York office to make up for the loss in this transaction. Mr. McNell flatly refused to do it. Mr. Brainard did not have the money or the access to the money to be able to do it. So, being the only one left, I was the logical third party to ask. I was told by Mr. Boesel personally that this would be repaid either in terms of increasing my commission percentage when I got registered or over in a bonus or in some way it would be repaid and that

they were men of good faith. And the securities business is done on one's word. And that if I would pay them the money, that I would in one way or another get it back. Also I wanted to make sure that the office would remain intact and it would continue and so on and so forth. So that again was guaranteed to me verbally.

"So after a lot of soul-searching I decided then in the best interests of the office and myself, everybody else, I would take a chance and do it. So I paid them $15,000, the loan of $15,000.

* * * *

"Q Please tell me what Mr. Boesel said to you.

"A Well, something to the effect that in general money was tight and it was rather a large loss, and it put the New York office in a definite position, and so forth; and that if and as things got getter (sic) or improved or whenever time went on, again I would either get paid out of an increase in commissions or in terms of a bonus, and so forth.

"Q You would get paid only if and as things got better?

"A No, not only if and as. But there was an implication that the firm --

"Q I don't want the implication. What did he say to you?

"A That the firm in essence wanted the money now and I would get it back later."

In its oral opinion refusing to set aside the jury's finding that the $15,000 payment was a loan, the court below cited principally defendant's failure to produce Boesel as a witness (A87). The affidavit submitted in support of defendant's subsequent formal motion to set aside the verdict pointed out that plaintiff had taken the deposition of the witness Cornelison, and had served written interrogatories on the witness Dickinson, but had never sought any discovery with respect to Boesel (A95-96). The court below adhered to its original

decision and denied the relief sought by defendant's motion (A97).

POINT I

THERE IS NO EVIDENCE TO SUPPORT THE CLAIM THAT THE $15,000 PAYMENT WAS A LOAN

It is urged on this appeal that the court below should have directed a verdict, or entered judgment notwithstanding the verdict, dismissing Campbell's claim that the $15,000 payment was a loan. The test is whether, viewing the evidence in the light most favorable to Campbell, there is substantial evidence supporting the verdict. Millers Mutual Ins. Ass'n of Illinois v. Southern Ry. Corp., 483 F.2d 1044 (4th Cir. 1973).

Alternatively, it is urged on this appeal that the court below abused its discretion in failing to set aside the verdict and order a new trial. Cf. Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970).

All of the evidence at trial was inconsistent with the jury's finding that the $15,000 payment was a loan. Such evidence showed that the payment was demanded by RGD & Co. as reimbursement for a loss (A29-33, 54). Such evidence further showed that Campbell borrowed the money from a bank in order to make the payment (A33, 59). Such evidence also showed that Brainard gave Campbell his demand promissory note for half the $15,000 loss (A34-36, 89).

The testimony of Brainard and Campbell as to what induced the $15,000 payment shows conclusively that the payment was not a loan. Thus, Brainard testified that he was assured "that we would remain in business, that I would receive my guarantee, which was $3000 a month, Mr. Campbell would retain his position; that we would have an opportunity to build this office as we had agreed previously" (A33). At best, all that this amounts to is a promise of no recriminations if reimbursement was made.

Again, Boesel was described by Brainard as saying that "we were doing the right thing by giving him the firm - loaning the firm the money, and that we would have the opportunity, Paul would have the opportunity to be repaid the loan, that the office would stay open, and that our venture would continue with their support and backing and that there would not be any recriminations, if you will" (A37). Although he uses the word "loan", what Brainard is describing is obviously not a loan at all. His conclusion, especially with respect to an ultimate fact, cannot take the place of evidence. And that is particularly true here, where the facts on which he reached his conclusion are in the record and are entirely inconsistent with his conclusion.

Campbell's testimony also makes clear that the payment was not a loan. Thus, he testified that "I was told by Mr. Boesel personally that this would be repaid either in terms of increasing my commission percentage when I got registered or over in a bonus or in some way it would be repaid and that

they were men of good faith. And the securities business is done on one's word. And that if I would pay them the money, that I would in one way or another get it back. Also I wanted to make sure that the office would remain intact and it would continue and so on and so forth. So that again was guaranteed to me verbally" (A54). The promise here described seems to be dependent on Campbell's producing increased profits for the firm. In any event, there can be no question that it was by its terms dependent on Campbell's continuing to provide his services as an employee.

Again, Campbell described Boesel as saying "something to the effect that in general money was tight and it was rather a large loss, and it put the New York office in a definite position, and so forth; and that if and as things got getter (sic) or improved or whenever time went on, again I would either get paid out of an increase in commissions or in terms of a bonus, and so forth" (A63). There is simply no way that this testimony can be squared with the conclusion of plaintiff's witnesses and the jury that the payment was a loan.

In view of the evidence, the court below clearly erred when it refused to set aside the jury's finding that the payment was a loan because of defendant's failure to produce Boesel as a witness. The jury was not entitled to conclude from such failure more than that Boesel would have confirmed what Campbell and Brainard said. And their testimony shows on its face that Boesel made no "absolute promise to repay" the $15,000. See Bankers Mortgage Co. v. Commissioner of

Internal Revenue, 142 F.2d 130, 131 (5th Cir. 1944), cert. denied, 323 U.S. 727, 89 L. ed. 583, 65 S.Ct. 61.

In addition, the court below overlooked the special circumstances of this case in stressing the absence of Boesel. The evidence showed that the discussions with Brainard and Campbell concerning the $15,000 payment were conducted by telephone, in conference calls, over "a conference microphone in Mr. Boesel's office" (A32). Plaintiff's own witnesses described Cornelison and Dickinson, both of whom testified at the trial, as participating with Boesel in the conversations (A33, 37, 60-62).

Moreover, plaintiff named Cornelison and Dickinson, but not Boesel, as individual defendants in the action (A3). All three men had their offices in Des Moines, Iowa (A43). Prior to the trial, plaintiff took the deposition of Cornelison, and served written interrogatories on Dickinson, but did not seek any discovery with respect to Boesel (A96). In these special circumstances, no adverse inference should have been drawn from defendant's failure to bring Boesel, as well as Cornelison and Dickinson, to New York for the trial.

The failure of plaintiff's witnesses to support the theory that the $15,000 payment was a loan was implicitly recognized by plaintiff's counsel. In his summation, counsel abandoned the loan theory and argued that Campbell should be repaid the $15,000 because he was not responsible for the loss (A80-82). But, even assuming that the jury had so found, the law is clear that, having voluntarily made reimbursement, the

question of Campbell's responsibility for the loss is no longer material. Blumenfeld v. Harris, 3 A.D.2d 219, 159 N.Y.S.2d 561 (1st Dept. 1957), aff'd, 3 N.Y.2d 905, 167 N.Y.S.2d 925, 145 N.E.2d 871, cert. denied, 356 U.S. 930, 2 L. ed. 2d 761, 78 S.Ct. 773 (1958).

POINT II

THE EVIDENCE SHOWS WITHOUT CONTRADICTION THAT CAMPBELL RESIGNED

Although RGD & Co. strongly contested at trial that Campbell had a one-year employment agreement, that issue has been resolved in Campbell's favor for purposes of this appeal. The evidence was in conflict and the jury's determination is therefore conclusive on that point.

Such is not the case, however, with respect to the jury's finding that Campbell had been discharged. Campbell admittedly gave his employer a letter of resignation. The letter is dated October 5, 1972 and says (A90):

> "Effective October 31, 1972 please accept my resignation from R. G. Dickinson & Co."

That letter, if voluntary, bars the claim that Campbell was discharged in breach of an agreement under which he was entitled to $18,000.

Campbell's testimony at trial concerning the resignation letter contains no suggestion that it was not his voluntary act. On the contrary, he made it plain that he wrote the letter of his own volition in order to facilitate his

getting another job (see A52).

Campbell did testify that he took the announcement that the New York office would be closed to mean that he had been fired (A51-53). But Campbell's conclusion that he had been discharged is as inconsistent with the evidence as is his conclusion that the $15,000 payment was a loan. There was no evidence of anything preventing Campbell from offering to work in one of the other offices of RGD & Co. and insisting on the $18,000 due him under his contract. Nor is there any evidence that he told RGD & Co. that he regarded the closing of the New York office as a unilateral repudiation of his employment agreement.

On the contrary, what Campbell communicated to RGD & Co. is completely inconsistent with the position that he had been discharged. In addition to the resignation letter, he sent two subsequent letters to RGD & Co. (A91-92). Each of these subsequent letters claims that Campbell was owed the $15,000 he had paid to his employer some months previously. Neither letter makes any reference to a claim under his employment agreement or suggests that he was in fact discharged. Neither letter even offers to withdraw his resignation and continue working for the company if he is paid the $15,000.

Perhaps Campbell's conclusion was based on an accurate perception that RGD & Co. wanted him to resign. But, even if so, the evidence showed clearly that there was no compulsion and the lack of compulsion makes insupportable the finding that Campbell was discharged. His case is indeed weaker than

the case of the plaintiff in Merrill v. Wakefield Rattan Co., 1 App.Div. 118, 37 N.Y.S. 64 (1st Dept. 1896), where the court said:

> "We need not consider the point upon which the complaint was dismissed, nor the reasons given by the learned judge for the dismissal. It was properly dismissed, if, for any reason, the plaintiff had no legal claim against the defendant. Now, assuming that the contract relation between the parties was unaffected by the formation of the New York company, or by the position in that company which the plaintiff took, still that contract relation terminated by what transpired when the plaintiff finally retired. At that time he not only resigned from the New York company, but completely severed his connection with the defendant's business. He did not resign with a reservation, did not even suggest a continuing contract with the defendant, and never again offered his services. On the contrary, although his resignation occurred on the 18th of February, he accepted his salary for the current month, namely, until the 1st of March, and then, without a word of complaint or objection, turned over to his successor the keys of the store, and the books of account and papers in his possession. It is quite immaterial how the resignation was brought about. The defendant requested it, and the plaintiff gave it. Possibly, - probably, even, - a refusal to resign would have been followed by a dismissal, but still there was no compulsion. There was a strong intimation of what was impending, but there was in fact no dismissal and no breach. The contract was canceled by mutual consent, and that is necessarily the end of plaintiff's case."

See also Halperin v. Wolosoff, 282 App.Div. 876, 124 N.Y.S.2d 572 (2d Dept. 1953), motion for leave to appeal denied, 306 N.Y. 981, 117 N.E.2d 807 (1954); Clasen v. Doherty, 242 App. Div. 502, 275 N.Y.S. 958 (1st Dept. 1934).

CONCLUSION

The Court should reverse the judgment and direct the court below to enter judgment dismissing the complaint.

Alternatively, the Court should reverse the judgment and remand the case for a new trial.

Respectfully submitted,

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